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Supreme Court, U.S.
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No.

In The Supreme Court of the United States

OCTOBER TERM, 1986

ROB WARDEN, CHICAGO LAWYER and SANDRA BIETILA,

Petitioners,

v.

HONORABLE ROBERT A. NOLAN, Judge of the Circuit Court of DuPage County,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED

1. Did the trial court's use of the standard "reasonable probability of prejudice" to impose, prior to trial, restraints on extra-judicial statements of attorneys and others, and to impound previously-public court files and transcripts, instead of the standard of "substantial probability of prejudice" recently ennunciated by this Court in *Press Enterprise v. Superior Court*, violate the petitioners' rights to free press, speech and association?

2. Did the trial court's imposition of restraints on extra judicial statements and impounding court files, in the absence of making specific factual findings, divising restraints effective to serve a compelling state interest, narrowly tailoring the restraints, and adequately considering alternatives, all contrary to the substantial precedents of this Court, violate petitioners' rights to free press, speech and association?

3. Did the trial court's failure, in a non-emergency situation, to give public notice prior to holding a hearing on whether to issue prospective restraints on extra-judicial statements and on court files and transcripts violate petitioners' right to due process of law?

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SANDRA BIETILA,

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HONORABLE ROBERT A. NOLAN, Judge of
the Circuit Court of DuPage County,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioners Rob Warden, Chicago Lawyer [1] and Sandra Bietila respectfully pray that a writ of certiorari be issued to review the decision of the Supreme Court of Illinois in this case, in which it refused to entertain an action for a writ of mandamus directed to respondent trial court judge.

OPINIONS BELOW

The May 5, 1986 order of the Supreme Court of Illinois, denying petitioners leave to file a complaint for writ of mandamus complaining of the March 3 Order, is unreported. The Order of respondent issued March 3, 1986, ("March 3

[1] In compliance with Rule 28.1 of the Rules of this Court, petitioners state that Chicago Lawyer is an Illinois limited partnership.

Order"), which formed the basis of the complaint, is also unreported. Both orders are reproduced in the Appendix hereto.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on May 5, 1986. On July 25, 1986, this Court extended the time for this petition to August 25, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioners Rob Warden, Chicago Lawyer, and Sandra Bietila brought an original action in the Illinois Supreme Court for a Writ of Mandamus or Supervisory Order to obtain relief from an order restraining extra-judicial statements, and impounding court files, entered by respondent Judge Robert A. Nolan, on March 3, 1986, in the case of *People v. Stephen Buckley*, 84 CF 362 (Circuit Court of DuPage County) (*"People v. Buckley"* or *"Buckley"*). On

May 5, 1986, the Illinois Supreme Court, with two Justices dissenting, issued a brief order denying leave to file the complaint for a writ. (App. 23a)

1. The Parties.

Petitioner Rob Warden is a reporter for and editor of Chicago Lawyer, a monthly newspaper that reports on matters of interest to the legal and judicial communities. Warden was reporting on the *Buckley* proceeding described below. (App. 8a-9a) Petitioner Sandra Bietila is Executive Director of the Illinois Coalition Against the Death Penalty. She has a special interest in advancing her political beliefs through associtional conduct that includes receiving and disseminating information about proceedings where the death penalty is sought or has been imposed. (App. 11a-12a) In the *Buckley* proceeding, there is a substantial likelihood that the death penalty will be sought by the prosecution. Respondent Robert A. Nolan is a judge of the Circuit Court of DuPage County, Illinois.

2. The *Buckley* Proceeding.

Respondent has pending before him *People v. Buckley,* 84 CF 362 (Circuit Court of DuPage County). In that case, Stephen Buckley is awaiting trial for a second time for the murder of Jeanine Nicarico, a Naperville, Illinois child.

During Buckley's first trial the jury was unable to reach a verdict as to him, but convicted his two then co-defendants, Rolando Cruz and Alex Hernandez. Cruz and Hernandez were sentenced to death, and the appeals of their convictions are pending in the Illinois Supreme Court. After the first trial, it was reported in the press that a Mr. Brian Dugan may have implicated himself in the Nicarico murder. (App. 2a, 8a) On December 23, 1985 and January 6, 9 and 10, 1986, Judge Nolan entered, *sua sponte* and without notice or hearing, a series of orders prohibiting all extra-judicial statements by attorneys for Buckley and his former co-defendants, and im-

pounding all court files in the pending *Buckley* proceeding as will as the transcripts of the original *Buckley* trial. (App. 3a, 8a-9a)

3. The Warden Intervention.

On January 21, 1986, Warden and Chicago Lawyer ("Warden") moved to intervene in *People v. Buckley* and to vacate the December and January orders. (App. 3a)

Respondent did not promptly schedule a hearing on the motion to vacate. On February 4, Warden filed an original action in the Illinois Supreme Court, *Warden et al. v. Nolan,* No. 63027 ("Warden v. Nolan I"), seeking a writ of mandamus or supervisory order[2] to Judge Nolan, directing him to vacate his orders of December and January. Warden also sought an order prohibiting Judge Nolan from issuing any similar orders in the future without first (1) making specific factual findings, (2) divising an order that would effectively serve a compelling state interest, (3) giving adequate consideration to alternatives, and (4) narrowly tailoring any restraints. (App. 5a-6a)

On February 19, Judge Nolan allowed Warden to intervene in *People v. Buckley*, and set the motion to vacate for hearing and argument on February 27. (App. 3a) On March 14, 1986, the Illinois Supreme Court, *sua sponte,* dismissed *Warden v. Nolan I* as moot, on the basis of the March 3 Order discussed below.

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[2]The request for a supervisory order was made pursuant to Rule 383 of the Rules of the Illinois Supreme Court, Ill. Rev. Stat. Ch. 110A, §383 (1985), and sought relief identical to that sought in the request for a writ of mandamus.

4. The March 3 Order.

On February 27 and 28, 1986, Judge Nolan purported to hold a hearing[3] on the motion to vacate. A Special State's Attorney, who was already representing Judge Nolan before the Illinois Supreme Court in *Warden v. Nolan I*, also was appoined by Judge Nolan to represent the respondent. The Special State's Attorney appeared before Judge Nolan as Judge Nolan's attorney, and as a proponent of new restraints. The State's Attorney of DuPage County represented the State of Illinois. Buckley was represented by the DuPage County Public Defender.

Judge Nolan did not hold a hearing on Warden motion to vacate. Instead, he heard evidence, presented by the Special State's Attorney, on whether prospective restraints on extra-judicial statements and on access to public court files should be imposed. Neither the state nor the defendant believed that any restraints were necessary. (Feb. 27 tr. at 9, 10)

No written or oral motion by Judge Nolan's attorney or any other party was made either at the commencement of, or during, the hearing to define the parameters of the hearing or of any proposed remedy. Warden's motion *in limine* (App. 15a), which attempted to limit the hearing to the consideration of evidence (if any) which already had been made of record in imposing the December and January orders, was denied (Feb. 27 tr. at 12-13, 66-76), as were objections to the lack of notice and the manner in which the court was proceeding (Feb. 27 tr. at 12-13, 37-48, 71-76).

It was not until the conclusion of the hearing that a new restraint was proposed by the trial judge's own attorney. (Feb. 28 tr. at 98-102) During the hearing, Warden never knew the extent future restraints were being considered. Warden was never given access to any of the materials which were

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[3]Transcripts of the two-day hearing are cited as "Feb.____ tr. at ____".

ultimately sealed.

After the conclusion of the proceedings, Judge Nolan entered, on March 3, 1986, an Order (App. 16a-20a) which vacated his prior orders of December and January, but which also imposed new and significant restrictions on extra-judicial statements by attorneys and others, as well as significant restrictions on access to court files and transcripts of previous courtroom proceedings in *People v. Buckley*. Respondent based his order on the conclusion that there was a "reasonable probability of prejudice" to a fair trial. (App. 17a)

Certain unspecified documents in the court file were sealed

> "because they consist of materials which bear upon the identity, testimony and credibility of witnesses and are the subject matter and object of ongoing investigations by the defendant and the People. . . ."

(App. 18a) Transcripts of all court proceedings between December 15, 1985 and January 21, 1986 were to be sealed until the trial judge could review them. (Feb. 27 tr. at 108; App. 18a-19a) [4]

The Order prohibits all extra-judicial statements in broad substantive areas, concerning both *People v. Buckley* and the Cruz and Hernandez prosecutions. It prohibits dissemination of any information concerning:

> "Any and all reports, statements, names of witnesses, photographs or any like thing or document arising out of or concerning any pretrial investigation which does or may relate to the instant case."

(App. 19a-20a) Its prohibitions apply to statements irrespective of whether the statements would pose any threat to

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[4] After the subsequent action of the Illinois Supreme Court on May 5, denying petitioners leave to file the mandamus action, Judge Nolan released some, but not all, of the transcripts.

Buckley's fair trial right.

In its restrictions on extra-judicial statements, the Order applies to all attorneys, past and present, for Cruz, Hernandez and Buckley, their associates and agents, and to employees of all state, county and municipal law enforcement agencies, without regard to whether those persons were before the court. (App. 19a)

The March 3 Order deprived Warden of sources of information essential to report on matters of public importance related to aspects of the Nicarico murder and the pending Buckley retrial. (App. 9a) Bietila, who regularly disseminates information about death penalty cases received from attorneys and others, and from court files, received no notice that Judge Nolan was considering the imposition of prospective restraints on attorney speech and court files. She was effectively precluded from attending and participating in the hearing that gave rise to the restraints in the March 3 Order. (App. 12a-13a)

5. Warden v. Nolan II

On April 4, 1986, Warden, Chicago Lawyer and Bietila, petitioners here, filed a new action in the Illinois Supreme Court, seeking leave to file a complaint for a writ of mandamus or supervisory order. They complained that the March 3 Order made it impossible to obtain information sufficient for Warden to report adequately on the *Buckley* case. Beitila also complained that she had been prohibited from advancing her associational and political goals. Petitioners further complained that respondent had given no public notice of intention to impose future restraints on extra-judicial statements and on court files and transcripts.

On May 5, after receiving respondent's answer, the court, in a single sentence and without any explanation, denied petitioners leave to file their Complaint. Two of the seven Justices dissented. Justice Clark would have directed Judge Nolan to vacate the portions of the Order sealing court files

and impounding transcripts. (App. 24a) Justice Simon's dissent stated that "Judge Nolan's orders throw an unnecessary cloak of silence over matters of public importance and thereby threaten core first amendment values." (App. 26a) He noted that Judge Nolan's use of the standard of "reasonable probability of prejudice " was "clearly erroneous", and expressed surprise at the state supreme court's "willingness to make such short shrift of an important first amendment standard." (App. 27a) It is because of the denial of relief by the Illinois Supreme Court that petitioners seek a Writ of Certiorari to this Court.

REASONS FOR GRANTING THE WRIT

I. AN ERRONEOUS LEGAL STANDARD WAS USED TO ABRIDGE PETITIONERS' RIGHTS.

This Court has repeatedly held that the press and public have First Amendment rights of access to observe and report on criminal trials. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (*"Press-Enterprise I"*); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 557-60 (1976). Recently, this Court held that the right extends as well to access to pretrial proceedings in criminal cases. *Press-Enterprise Co. v. Superior Court*, ____ U.S. ____(June 30, 1986) (*"Press-Enterprise II"*).

In *Press-Enterprise II* this Court ended any doubt about the appropriate standard to be applied: consistent with the First Amendment, restraints can be imposed only if there is a "substantial probability" of prejudice to the defendant's fair trial right. Slip op. at 11-12. In *Press-Enterprise II*, this court rejected the standard of "reasonable likelihood" of prejudice, stating that standard "places a lesser burden on the [proponent of the order] than the 'substantial probability' test which we hold is called for by the First Amendment." Slip op. at 12. Judge Nolan's use of the standard of "reasonable likelihood" is squarely at odds with this Court's most recent decision. For

that reason alone, the writ should be granted, and the Order reversed.

II. THE ORDER VIOLATES OTHER SUBSTANTIVE AND PROCEDURAL REQUIREMENTS NECESSARY FOR THE CONSTITUTIONAL IMPOSITION OF RESTRAINTS.

The March 3 Order does not, by its terms, prohibit publication of news articles concerning the Buckley case, nor does it prohibit the public from attending courtroom proceedings. However, it has prevented petitioners from obtaining information sufficient to report on the *Buckley* proceeding, and from exercising other aspects of their rights to a free press, and free speech. In addition, it has prevented Bietila from exercising her right "to engage in association for the advancement of beliefs and ideas." *In re Primus*, 436 U.S. 412, 424 (1978); *NAACP v. Button*, 371 U.S. 415, 430 (1963); *NAACP v. Alabama*, 357 U.S. 449, 460 (1958).

This Court has repeatedly invalidated broad restrictions on access to the courtroom (*Press-Enterprise II, supra; Press-Enterprise I,* 464 U.S. 501; *Globe Newspaper Co.*, 457 U.S. 596;, *Richmond Newspapers*, 448 U.S. 555) and restraints on publication *(Nebraska Press Ass'n,* 427 U.S. 539). This case presents an issue not previously addressed by this Court: whether the First Amendment is similarly violated by pre-trial restrictions on extra-judicial statements and on access to transcripts of previously-public courtroom proceedings and other public court files. In petitioners' view, the First Amendment applies here with equal force. Petitioners seek nothing more than the opportunity to exercise their First Amendment press, speech and associational rights free of unconstitutional interference by the trial court judge. By respondent's actions, petitioners have been prevented from exercising those rights just as surely as if respondent had removed petitioners from the courtroom or

prohibited them from disseminating information. [5]

Each time the issue of the First Amendment rights of the public during a criminal proceeding has been presented to it, this Court has held that restraints on these rights are permissible only in narrowly-defined situations. The court must make specific factual findings. A restraint may be imposed only if it will be effective in protecting a compelling state interest. The restraint must be narrowly tailored, and adequate consideration must be given to alternatives. *Press Enterprise II*, slip op. at 11-12; *Press Enterprise I*, 464 U.S. at 509-10; *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 607; *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 581-82. The March 3 Order fails to meet each of these prerequisites.

A. The Factual Findings and Record Evidence are Insufficient.

There are neither insufficient factual findings nor record evidence to support any restraint. The Order is premised on the occurrence of "a great deal of media coverage" of the case.[6] There is no finding that the publicity posed either a "substantial probability", or even a "reasonable likelihood", of prejudice to Buckley's ability to receive a fair trial. This Court has held that "pretrial publicity – even pervasive, adverse publicity – does not inevitably lead to an unfair trial."

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[5] Restraints on extra-judicial statements were held to violate the free press guarantee of the First Amendment in *CBS v. Young*,522 F.2d 234 (6th Cir. 1975), citing *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). *See also, Levine v. U.S. Dist. Court*, 764 F.2d 590, 594 (9th Cir. 1985), cert. denied, ____ U.S.____, 106 S. Ct. 2276 (1986).

[6] The evidence offered in support of the restraints was introduced by the Special State's Attorney (Exhibits 1 through 19 AAAAA). It was simply a mass of newspaper articles and videotapes, most of them far removed in time from the proceeding. The bulk of the publicity concerned the February 1983 murder of the victim, the subsequent arrest and trial of the three defendants, and the conviction and sentencing of Cruz and Hernandez. Also included were two change of venue motions filed by Buckley and denied by the trial court. Very few of the media-related exhibits concerned the time period of the pending retrial.

Nebraska Press Ass' v. Stuart, 427 U.S. at 554. See also *Press Enterprise II*, slip op. at 13. No evidence of record was introduced to support a finding of "substantial probability" of prejudice, and this alone renders the restraints unconstituional.

The factual findings in the March 3 Order can be easily summarized. First, respondent found that the prosecution and defense "were concerned" that unnamed third parties were being given information,[7] "thereby affecting" the right to a fair trial. (App. 17a) Judge Nolan failed to identify the information, its source, the recipients, or the manner in which access to such information affected the fair trial right.

Judge Nolan also found that there was an oral agreement by the state and defense not to disclose information or documents. (App. 17a) The details of the agreement are not given. Buckley's counsel testified that the only order she thought necessary was one that would do no more than remind attorneys of their responsibilities under the Illinois Supreme Court rules. (Feb. 28 tr. at 51-52.)

Respondent found that the flow of "certain information" continued in spite of the oral agreement and in spite of Illinois' Disciplinary Rule 7-107, Ill. Rev. Stat., ch. 110A, Rule 7-107 (1985). (App. 28a-30a) There is no finding that the passage of information violated the Disciplinary Rule and again, the information, its recipient, and it source are not identified.

Finally, the Order contains an implicit assumption, unsupported by any finding or evidence, that the publication of the identity of potential witnesses is *a fortiori* prejudicial. (App. 18a, 19a)

These sparse findings clearly do not meet this Court's requirement that any order abridging First Amendment rights

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[7]The Order also states that attorneys for Buckley's former co-defendants had the same concern. However, there is no record evidence to that effect, and neither Cruz nor Hernandez nor their attorneys were before Judge Nolan in the pending case of *People v. Buckley* or in the February 26 and 27 hearing.

must be supported by specific factual findings.[8]

B. The Restraints Will Not Effectively Protect the Asserted State Interest.

Judge Nolan has identified the compelling state interest to be "the right of the state and the defendant to a fair trial before an impartial jury." (App. 17a) This Court has made clear that any order imposing prior restraints must effectively protect the identified interest. *Press-Enterprise II*, slip op. at 11; *Press-Enterprise I*, 464 U.S. at 510, *Globe Newspaper Co.*, 457 U.S. at 606-07. Here, the Order is not effective in protecting the fair trial right.

For example, if Buckley's fair trial right is threatened by public reports of the identity of potential witnesses, that fact must appear in the findings. It must also appear that the witness' identity has not already been made public, for certainly no prior restraint could effectively remove Brian Dugan's identity from the public domain.

The Order is also ineffective in its sealing of transcripts. While petitioners do not know the contents of the sealed transcripts, sealing is not effective to keep from public knowledge that which occurred in open court. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. at 571 (Powell, J., concurring) ("[A] restraint may not issue unless it is also shown

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[8] During the hearing, there were colloquies between Judge Nolan and the State and defense attorneys concerning the fact that there was a potential witness but not identifying any reason why that person's identity should be kept secret. (Tr. of Feb. 28 at 72-75, 102-03, 114-15 and 117-18.) Judge Nolan also based portions of the March 3 order on "the prior comments of counsel for the defendant and the State concerning pretrial publicity which accompanied the identity, alleged statements and credibility of potential future witnesses." (App. 16a) Even if such statements of counsel could be a basis for a properly limited order, here such "comments" were not made of record and the failure to identify them absolutely defeats any attempt by petitioners to effectively challenge the substance of those statements as a basis for the trial court's restriction.

that previous publicity. . .will not render the restraint inefficacious.")

Since the order is not effective in protecting the identfied state interest, it is unconstitutional. *Press-Enterprise I*, 469 U.S. at 510; *Globe Newspaper Co.*, 457 U.S. at 606-07.

C. The Restraints are Not Narrowly Tailored.

Any order restricting access must be narrowly and stringently drawn so as to minimize the infringement of First Amendment rights. *Press-Enterprise II*, slip op. 13; *Press Enterprise I*, 464 U.S. at 510 ; *Globe Newspaper Co.*, 457 U.S. at 607. Respondent's order fails this requirement both in the restraint on court transcripts and files, and in its prohibition against extra-judicial statements.

Certain transcripts of proceedings that had been held in open court before respondent, but with which Judge Nolan was unfamiliar at the time he issued the Order, remained under seal, because the court could not recall their content. (Feb. 28 tr. at 108; App. 19a) In addition, unidentified documents were removed by respondent from the public court files during the hearing simply because of the potential that they concerned a witness' identity and were the subject of investigation. (Feb. 27 tr. at 146-48; App. 18a) The impound portion of the March 3 Order is therefore not narrowly tailored, since it seals entire transcripts without regard to whether the information in them actually posed any threat to Buckley's fair trial right.[9]

The Order bars extra-judicial statements "arising out of or concerning any pretrial investigation which does or may relate to the instant case." (App. 19a-20a) No attempt is made to limit the prohibition to statements that pose a substantial probability of prejudice to the identified state interest. Statements are banned discussions "whether prejudicial

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[9] At the hearing and in the Order, respondent described a procedure whereby he would review transcripts and consult with prosecu-

(Footnote continued on the following page)

or innocuous, whether subjective or objective, whether reportorial or interpretive." *CBS v. Young*, 522 F.2d 235, 239-40 (6th Cir. 1975). For example, the March 3 Order prohibits public release of information about the original public trial of Cruz, Hernandez and Buckley, as well as statements relating to whether the Dugan claim is still under investigation, regardless of whether the release of the information would pose a substantial probability of prejudice. This expansive order, with its delineation of broad subject areas of forbidden communications irrespective of their threat, lacks the narrowness required by the First Amendment *Press-Enterprise II*, slip op. at 13.

D. The Trial Court Did Not Give Adequate Consideration To Alternatives

Alternatives to restraint on First Amendment freedoms must be considered and found wanting in order for a prior restraint to be justified. *Press-Enterprise II*, slip op. at 12; *Press-Enterprise I*, 464 U.S. at 511-13; *Richmond Newspapers, Inc.*, 448 U.S. at 581. The only alternatives stated in the March 3 Order are the oral agreements of state and defense counsel, and the existence Illinois Supreme Court Rule 7-107, Ill. Rev. Stat. ch. 110A, Rule 7-107 (1985).[10] (App. 28a-30a)

In *Press-Enterprise II*, this Court stated that through *voir dire*, a court can identify those jurors whose prior knowledge of the case would render them unable to reach an impartial

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(Continued from previous page)
tion and defense attorneys to determine whether to release them. Counsel for petitioners was excluded from this *in camera, ex parte* review. (Feb. 28 tr. at 108-10; App. 18a) Subsequently, some portions of the sealed transcripts were released, but other portions remain under seal. Petitioners are unaware of the contents of those transcripts.

[10]That Rule prohibits extra-judicial statements by attorneys in criminal cases if the statements concern specified subject areas and "pose a serious and imminent threat to the fairness of a trial." (App. 28a)

verdict. Slip op. at 12-13. In *Nebraska Press Ass'n v. Stuart*, the Court explicitly spelled out (and approved) several alternatives that at a minimum must be considered by respondent:

> (a) change of trial venue to a place less exposed to the intense publicity [11]. . .; (b) postponement of the trial to allow public attention to subside; (c) searching questioning of prospective jurors. . .to screen out those with fixed opinions as to guilt or innocence; (d) the use of emphatic and clear instructions on the sworn duty of each juror or to decide the issues only on evidence presented in open court. Sequestration of jurors is, of course, always available. Although that measure insulates jurors only after they are sworn, it also enhances the likelihood of dissipating the impact of pretrial publicity and emphasizes the elements of the jurors' oaths.

427 U.S. at 563-64. (Footnote omitted.)

Respondent's considerations do not meet this constitutionally-mandated requirement. Not only did he fail to consider specific alternatives suggested by this Court, but he made no finding as to the extent to which the Disciplinary Rule was breached or inadequate in any respect. The March 3 Order fails to meet the strict constitutional requirements for prior restraints on speech. This failing is another reason the Court should grant this Petition.

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[11] In Illinois, the change of venue motion belongs exclusively to the defendant. (Ill. Rev. Stat., Ch. 38 §114-6 (1985).) However, the alternative of drawing a jury from another county is available in Illinois. *See People v. Gacy*, 103 Ill. 2d1, 648 N.E. 2d 1171, 1187 (1984), *cert. denied*, ____U.S. ____, 105 S.Ct. 1410, *rehearing denied*, ____U.S. ____, 105 U.S. 2128 (1985).

III. THE ORDER WAS ISSUED WITHOUT ADEQUATE PUBLIC NOTICE THAT THE COURT WAS CONSIDERING THE IMPOSITION OF PROSPECTIVE RESTRAINTS.

At the time Judge Nolan held the February 27 and 28 hearing, the only motion pending before him was Warden's motion to vacate the gag and impound orders of December and January. There were no other pending motions, and Judge Nolan's February 19 Order (App. 14a) sets only that motion for hearing and argument. However, respondent did not hold a hearing on motion to vacate. He heard new evidence presented by his own attorney, which previously was not of record in the case. The new evidence attempted to support an unidentified prospective restraint, in the absence of any restrictions being requested by either the prosecution or the defense. *Sua sponte,* without notice to the public, Judge Nolan issued a new, and different, order from the one Warden sought to have vacated.[12] In issuing this non-emergency order without first giving any public notice, Judge Nolan effectively precluded petitioner Bietila from attending, and seeking to participate in, the hearing. (App. 4a, 12a-13a) Had she known that prospective restraints on attorneys' and others' speech and on court files would be considered at the hearing, she would have sought to participate, for both these sources of information are vital to the exercise of her speech and associational activities. (App. 4a, 12a-13a)

In *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 609 n.25, this Court stated that orders concerning prospective restraints on First Amendment rights can issue only with notice to the press and public. Several

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[12] Prior to the hearing on February 27, Warden filed a Motion in Limine seeking to limit the evidence on the motion to vacate to evidence of record at the time the December and January orders were issued. (App. 15a) Respondent denied the motion, and would not identify the evidence (if any) which was of record as the basis for the December and January orders. (Feb. 27 tr. at 75-76.)

Circuit Courts of Appeal have held that such notice is required. *In re Application of Herald Co.*, 734 F.2d 93 (2d Cir. 1984); *United States v. Brooklier*, 685 F.2d 1162, 1167-68 (9th Cir. 1982);*United States v. Schiavo*, 504 F.2d 1, 6-8 (3d Cir.), *cert. denied sub nom Ditter v. Philadelphia Newspapers Inc.*, 419 U.S. 1096 (1974).[13] This case presents the Court with the opportunity to clarify that notice is in fact constitionally required in a non-emergency situation [14] such as that posed by this case.

IV. CONCLUSION

In the absence of action by this court, petitioners are left without redress.[15] Warden and Chicago Lawyer have attempted to obtain relief from respondent's orders beginning in January, 1986, with their motion to vacate the December and January orders. Judge Nolan effectively held that motion at bay until March 3, and then continued in effect substantial, unjustified restraints on extra-judicial statements and on

---

[13] Since due process requires that notice must make real the opportunity for participation, including the ability to take a position on the merits, *Carroll v. President & Com'rs of Princess Anne*, 393 U.S. 175, 182-84 (1968), notice should include the asserted interest supporting closure and the scope of the proposed restraint. The reason is evident from this case. Judge Nolan appointed a Special State's Attorney to present evidence supporting the judge's position, but no proposed restraint or compelling interest was identified by the proponent of the order until after the close of evidence. (Feb. 28 tr. at 90, 98, 103.) Because neither Judge Nolan nor his attorney ever identified, in the exhibits or otherwise, what constituted the threat to Buckley's fair trial right, it was not possible for Warden to take a position at the hearing.

[14] No finding of emergency was made by the trial court, and the time delays created by respondent in scheduling Warden's motion to vacate for hearing (see App. 3a-4a) belies the existence of any such emergency.

[15] As of the date of filing of this petion, Buckley's retrial has not yet commenced.

previously-public court files and transcripts of public proceedings. The Illinois Supreme Court, in its May 5 rejection of petitioners' request for mandamus, refused to provide any relief from the prior restraints. Since that court declined to act, this Court must intercede to protect petitioners' constitutional rights.

In similar circumstances, this Court has provided relief when the highest state court refused to do so. *Press-Enterprise II*, (preemptory writ of mandate denied by state court); *Press-Enterprise I*, 464 U.S. 501 (denial of request for hearing by state supreme court); *Globe Newspaper Co.*, 457 U.S. 596 (appeal dismissed by highest state court); *Richmond Newspapers, Inc.* 448 U.S. 555 (petition for writs of prohibition and mandamus, and appeal, denied).

Unless this Court grants the writ to review the action of the Illinois Supreme Court, trial courts will continue to issue orders violative of First and Fourteenth Amendment rights, free from interference by the higher courts.

WHEREFORE, petitioners pray that this Court issue a Writ of Certiorari to the Supreme Court of Illinois and to reverse the May 5 Order denying leave to file the Complaint for a Writ of Mandamus.

Respectfully Submitted,

HARVEY GROSSMAN
JANE M. WHICHER
ROGER BALDWIN FOUNDATION
of ACLU, Inc.
220 South State Street
Room 816
Chicago, Illinois 60604
(312) 427-7330

Chicago, Illinois
August 25, 1986

APPENDIX

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IN THE SUPREME COURT OF
THE STATE OF ILLINOIS

ROB WARDEN, CHICAGO LAWYER, and SANDRA BIETILA,
Plaintiffs,

v.

ROBERT A. NOLAN, Judge, Circuit Court of the Eighteenth Judicial Circuit,
Defendant.

NO.63318

COMPLAINT FOR A WRIT OF MANDAMUS OR IN THE ALTERNATIVE FOR A SUPERVISORY ORDER

To the Honorable Justices of the Supreme Court of the State of Illinois:

Plaintiffs, Rob Warden, Chicago Lawyer, and Sandra Bietila pursuant to Ch. 110 ¶14-101 *et seq.*, Ill. Rev. Stat. (1983) and Rule 381 of the Rules of this Court, respectfully petition this Court for a writ of mandamus directing and commanding defendant Robert A. Nolan, Judge of the Circuit Court of the Eighteenth Judicial Circuit of the State of Illinois, (1) to vacate his Order of March 3, 1986 prohibiting extra-judical statements by attorneys and others, and sealing court files, in *People v. Stephen Buckley*, 84 CF 362 (Circuit Court of DuPage County) (hereinafter "*Buckley*" or "*People v. Buckley*" and (2) to refrain from issuing any such orders in *Buckley* in the future unless a prior hearing is held with sufficient notice to the public prior to the hearing, and unless constitutionally sufficient findings in support of any such orders, based on record evidence, are made and any such orders are narrowly tailored and effective in protect-

ing a compelling interest. In the alternative, plaintiffs move pursuant to Rule 383 for a supervisory order providing similar relief. In support thereof, plaintiffs state as follows:

PARTIES

1. Plaintiff Rob Warden is editor of and a reporter for plaintiff Chicago Lawyer, a monthly publication that reports on events in the Chicago metropolitan area related to the law and the judiciary. Plaintiff Sandra Bietila is Executive Director of the Illinois Coalition Against the Death Penalty and has a special interest in having access to information about pending criminal proceedings in which the death penalty is or may be sought.

2. Defendant Robert A. Nolan is a Judge of the Eighteenth Judicial Circuit sitting in DuPage County, Illinois. The case of *People v. Stephen Buckley*, 84 CF 362, is pending before defendant.

FACTS

3. In 1984, Stephen Buckley, Rolando Cruz and Alex Hernandez were tried for the murder of a Naperville, Illinois child, Jeanine Nicarico. Cruz and Hernandez were convicted and sentenced to death; their appeals are pending before this Court. The jury was unable to reach a verdict as to Buckley, and his retrial is pending before defendant in *People v. Buckley*. The trial is presently set to begin on May 7, 1986.

4. Plaintiff Warden has been reporting, for plaintiff Chicago Lawyer, on the criminal trials and appeals therefrom of Buckley, Cruz, and Hernandez and the publicized possible involvement of Brian Dugan in the Nicarico murder. Plaintiff Warden, in connection with his reporting, has discussed various aspects of the case with attorneys who are now, or have been in the past, attorneys of record in the trial and appellate court actions, and others, and has examined portions of the court files in *People v. Buckley*. See Affidavit of Rob Warden, Exhibit A to this Complaint.

5. Plaintiff Bietila is Executive Director of the Illinois Coalition Against the Death Penalty. She has a special interest in following the course of criminal proceedings where the death penalty is or may be sought. As a part of her duties as Executive Director, she frequently obtains information from court officials and attorneys representing persons charged with capital offenses and attends court appearances of persons charged with capital offenses or under sentence of death. She uses the information to educate members of the public about the death penalty, to advocate opposition to the death penalty, and to aid attorneys in the appeals of persons against whom the death penalty has been imposed. See Affidavit of Sandra E. Bietila, Exhibit B hereto.

6. On information and belief, on December 23, 1985, defendant, on his own Motion, without giving public notice or holding a hearing or making any public findings, entered an oral order prohibiting all past and present attorneys for defendant Buckley and for his co-defendants Cruz and Hernandez from making any extra-judicial statements about the case. On January 6, 1986, defendant entered a written Order to the same effect, without holding a hearing or making any public findings. On January 10, 1986, again without holding a hearing or making public findings, defendant issued a further Order impounding the court file in the *Buckley* case.

7. On January 21, 1986, plaintiffs Warden and Chicago Lawyer filed a Motion to Intervene in *Buckley* and a Motion to Vacate the Orders described in paragraph 6 above. On February 19, 1986, Judge Nolan granted the Motion to Intervene and set the Motion to Vacate for argument and hearing for February 27, 1986. See Exhibit C, Order of February 19, 1986.

8. On February 27, 1986, defendant refused to identify or to make of record the evidence or facts upon which he relied in his Orders of December 23, and January 6, 9 and 10. He also refused to limit the hearing, in conformity with plaintiffs' motion *in limine* (attached hereto as Exhibit D), to the Motion

to Vacate and the evidence upon which he relied in making the Orders of December 23 and January 6, 9 and 10. Instead, defendant, without prior public notice, *sua sponte* convened a hearing and received evidence through his own counsel on whether prospective restraints on extra-judicial statements and court files should be issued.

9. On March 3, 1986, defendant Nolan issued an Order ("March 3 Order"), attached hereto as Exhibit E, vacating his Orders of December 23, 1985 and January 6, and 10, 1986, and imposing substantial prior restraints on extra-judicial statements by past and present attorneys and agents for Buckley, Cruz and Hernandez, and on others, and sealing transcripts of all court proceedings between December 16, 1985 and January 21, 1986.

10. In making the March 3 Order, Judge Nolan relied on matters that were not record evidence before him. In addition, there was insufficient record evidence that a compelling state interest was threatened, and that the restraints imposed by the March 3 Order are necessary to protect the interest.

11. Plaintiffs Warden and Chicago Lawyer, by operation of the March 3 Order, have been prohibited from obtaining and publishing information on the pending Buckley retrial, the appeals of Cruz and Hernandez, and the investigation of the Dugan allegations. See Exhibit A hereto. Plaintiff Bietila, by operation of the March 3 Order, has been prohibited from obtaining, discussing and disseminating information about the Buckley retrial and the appeals of Cruz and Hernandez, and has been prohibited from advancing her associational and political goals as a member of the public and as Executive Director of the Illinois Coalition Against the Death Penalty. See Exhibit B hereto.

CLAIM FOR RELIEF

12. This complaint presents only issues of law.

13. Defendants' action in issuing the March 3 Order has violated plaintiffs' constitutional rights in at least the following aspects:

a. The Order was issued without notice to the public;

b. Judge Nolan relied on matters other than record evidence in issuing the Order;

c. The Order contains inadequate factual findings to support its restraints, and there is insufficient record evidence to support the restraints;

d. No showing or finding was made that a compelling state interest is actually threatened;

e. No showing or finding was made that the restraints are necessary to protect a compelling state interest;

f. The Order is not narrowly tailored in that it prohibits extra-judicial statements and seals court files that do not pose a serious and imminent threat to the fair administration of justice.

14. The March 3 Order entered by defendant is a prior restraint on plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution and under Art. I, Sec. 4 of the Constitution of the State of Illinois. It prevents all plaintiffs from obtaining and publishing information obtained from past and present attorneys for Buckley, Cruz and Hernandez and their agents and information obtained from court files, and also prevents plaintiff Bietila from advancing her associational and political goals. The March 3 Order was entered without prior public notice sufficient to allow plaintiff Bietila to attend and participate.

15. Plaintiffs have been and continue to be irreparably injured by defendant's Order of March 3 because it prevents plaintiffs from obtaining and publishing information on a matter of current public interest.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that a writ of mandamus be issued immediately by this Court, directed to defendant Judge Robert A. Nolan, as Circuit Judge of the Circuit Court of the Eighteenth Judicial Circuit, (1) commanding him forthwith to vacate the order entered on March 3, 1986 in *People of The State of Illinois v. Buckley*, 84 CF 362, and (2) directing him to refrain from entering any further orders in that proceeding impounding court files or prohibiting extra-judical statements unless a prior hearing is held, with sufficient public notice prior to the hearing, unless constitutionally sufficient factual findings based on record evidence are made, and unless a proven compelling state interest is actually threatened and the restraints are necessary to protect the interest and will be effective in protecting the interest, and unless any such orders are sufficiently narrowly tailored. In the alternative, plaintiffs move for a supervisory order providing similar relief issued pursuant to Rule 383 of the Rules of this Court.

Respectfully submitted,

BY: /S/ JANE M. WHICHER
One of Plaintiffs' Attorneys

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CERTIFICATION

Under penalties as provided by law pursuant to sections 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct, except as to matters stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that she verily believes the same to be true.

/S/ JANE M. WHICHER
Jane M. Whicher

EXHIBIT A

IN THE SUPREME COURT OF
THE STATE OF ILLINOIS

ROB WARDEN, CHICAGO LAWYER, and SANDRA BIETILA,
Plaintiffs,

v.

ROBERT A. NOLAN, Judge, Circuit Court of the Eighteenth Judicial Circuit,
Defendant.

NO.

AFFIDAVIT OF ROB WARDEN

Rob Warden, being first duly sworn on oath, deposes and states as follows:

1. I am the editor of Chicago Lawyer, a monthly publication that reports on events in the Chicago metropolitan area relating to the law and the judiciary. I am submitting this affidavit on my own behalf and on behalf of Chicago Lawyer in support of the Complaint For a Writ of Mandamus or Supervisory Order against Judge Robert A. Nolan.

2. I have been attempting to cover and report upon, and to assign writers for Chicago Lawyer to cover and report upon, the criminal trials, and appeals therefrom, involving the murder of a Naperville child named Jeanine Nicarico, and the reported confession of Brian Dugan to that murder.

3. I have been deprived of irreplaceable sources of information by virtue of certain orders entered by Judge Robert A. Nolan in Case No. 84 CF 362, which involves the retrial of Stephen Buckley for the Nicarico murder. In December 1985 and January 1986, Judge Nolan issued orders in the *Buckley*

case which prohibited all attorneys ever of record for Cruz, Hernandez and Buckley from discussing any aspect of the case with me or any other person and impounded the entire court file. As a result I was unable to obtain access to information about the *Buckley* case and related matters sufficient to report on those proceedings in Chicago Lawyer.

4. The orders described in paragraph 3 were in effect until March 3, 1986, when Judge Nolan entered a new order. As more fully set forth below, the March 3 Order has deprived me of access to information sufficient to enable me to report on the proceedings.

5. Since the issuance of the March 3 Order, I have had conversations with several present and past attorneys for Buckley, Cruz and Hernandez and other persons who are covered by the March 3 Order. Those persons have told me that, but for the order, they would provide me with information and documents concerning the case. One of those attorneys told me that he was unsure whether information and documents he had fell within paragraph 4(f) of the Order or not, and that because of the risk of a contempt proceeding he would not provide the information and documents to me. As a result, I have been unable to obtain sufficient information about the murder, the previous trial, and the pending retrial to report on them.

6. Because of Judge Nolan's December and January Orders, Chicago Lawyer was unable to publish articles about the *Buckley* proceeding in the February or March issues. The March 3 Order has similarly prohibited me from being able to publish any articles about the *Buckley* proceeding in the April issue of Chicago Lawyer.

7. Every day that the order remains in effect makes it less likely that Chicago Lawyer will be able to report on this case in the edition subsequent to the upcoming edition. This matter is currently of widespread public interest. With each day of delay in lifting the order, the public's interest in this matter is diminished. the longer access is delayed the less likely it is that this matter will be newsworthy when access is allowed. Should access be denied for a sufficiently long period, it is possible that no report relating to the case will appear in Chicago Lawyer.

FURTHER AFFIANT SAYETH NOT.

/s/ ROB WARDEN
Rob Warden

Subscribed and sworn to before me this 2nd day of April, 1986.

/s/ SYLVIA ANNE SMITH
NOTARY PUBLIC

EXHIBIT B

IN THE SUPREME COURT OF
THE STATE OF ILLINOIS

ROB WARDEN, CHICAGO LAWYER, and SANDRA BIETILA,
Plaintiffs,

v.

ROBERT A. NOLAN, Judge, Circuit Court of the Eighteenth Judicial Circuit,
Defendant.

NO.63318

AFFIDAVIT OF SANDRA E. BIETILA

STATE OF ILLINOIS
SS:
COUNTY OF COOK

Sandra E. Bietila, upon her oat, deposes and states as follows:

1. I am the Executive Director of the Illinois Coalition Against the Death Penalty, a not-for-profit organization that seeks to abolish the death penalty in Illinois and, in cases where the death penalty has been imposed, to provide legal and emotional support to, and advocacy on behalf of, the defendant and his or her family.

2. As Executive Director and as one with personal interest in criminal cases where the death penalty is sought or has been imposed, I frequently obtain information from court personnel and from attorneys concerning many aspects of pretrial proceedings, trials and appeals.

3. I frequently attend, and arrange for members and volunteers of the Coalition to attend, court appearances where persons under sentence of death are in court for various pretrial and posttrial proceedings, and trials of persons charged with capital offenses, to observe the proceedings, to report to members of the Coalition on the proceedings, and to provide support for defendants and their families.

4. The information I obtain from the activities described in paragraphs 2 and 3 above is used by me in writing the Coalition's newsletter, in speaking before groups about the death penalty, in urging others to oppose the death penalty, and in compiling statistics for use by attorneys handling appeals for defendants in death penalty cases.

5. In order to carry out the activities set forth in paragraphs 2, 3 and 4 above, I need access to information about pending criminal proceedings from attorneys from court personnel, and from court files.

6. I have been informed that Judge Robert A. Nolan, Circuit Judge of the Eighteenth Judicial Circuit, held a hearing on February 27 and 28, 1986 in *People v. Buckley*, 84 CF 362 that concerned whether court files in that case were to be impounded in the future and whether attorneys and agents for Stephen Buckley and his former co-defendants, Rolando Cruz and Alex Hernandez, would be allowed in the future to make extra-judicial statements concerning the *Buckley* case, and the *Cruz* and *Hernandez* cases. I received no notice that Judge Nolan was going to hold such a hearing. If I had received notice, I would have attended or asked a member of or volunteer for the Coalition to attend, and sought to participate, since access to information about criminal defendants such as

Stephen Buckley, and about his former co-defendants and their trials and appeals, is crucial to my being able to perform the activities described in paragraphs 2, 3 and 4 of this Affidavit.

/s/ SANDRA E. BIETILA
Sandra E. Bietila

Subscribed and sworn to before me this 31st day of March, 1986.

/s/ SYLVIA ANNE SMITH
NOTARY PUBLIC

EXHIBIT C

UNITED STATES OF AMERICA

STATE OF ILLINOIS COUNTY OF DUPAGE

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT

PEOPLE OF THE STATE OF ILLINOIS

-VS- Case No. 84 CF 362

STEPHEN BUCKLEY

Defendant

ORDER

This cause having come on to be heard upon the motion of the Intervenors Rob WARDEN *et al* and the Court being fully advised in the premises, and having jurisdiction of the subject matter:

IT IS HEREBY ORDERED (1) That Motion to Intervene filed by Rob WARDEN and the Chicago Lawyer is granted instanter.

(2) That motions to vacate this Court's orders of Dec 23, 1985, Jan 6, 9, 10 of 1986 (Protective orders) are continued to February 27, 1986, at 10:00 AM for argument and hearing.

(3) That Subpoena *Duces Tecum* Returnable Feb 19, 1986, held in open court, are all continued to Feb 27, 1986, and are in full force and effect.

Name Botti
DuPage Attorney No. 7640
Attorney for Special States Attorney
Address 2211 York
City Oak Brook
Phone 789-8585

Enter:
/s/ ROBERT A. NOLAN
Judge

Date Feb 19, 1986

EXHIBIT D

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiffs,

v.

STEPHEN BUCKLEY,

Defendant.

NO. 84 CF 362

MOTION IN LIMINE

Intervenors Rob Warden and Chicago Lawyer, by their attorneys, hereby move the Court to enter, pursuant to Supreme Court Rule 218, an Order in Limine limiting the evidence to be heard by the Court on Intervenors' Motion to Vacate Gag and Impoundment Orders to only that evidence relied on by the Court in entering the orders of December 23, 1985 and January 6, 9 and 10, 1986, and barring all other evidence.

In support of this motion, intervenors submit the attached memorandum.

Respectfully submitted,

/s/ JANE M. WHICHER
Jane M. Whicher

JANE M. WHICHER #4461
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EXHIBIT E

STATE OF ILLINOIS

SS.

COUNTY OF DU PAGE

IN THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT,
DU PAGE COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiffs,

v.

STEPHEN BUCKLEY,

Defendant.

NO. 84 CF 362

ORDER

THIS CAUSE coming on to be heard on the motions of the various intervenors through their counsel, to vacate certain protective orders dated December 23, 1985, January 6, 1986 and January 10, 1986, entered by this Court, and the Court having considered the Defendant's evidence admitted in prior proceedings, including motions for change of venue; the Court having considered the prior comments of counsel for the Defendant and the State concerning pretrial publicity which accompanied the identity, alleged statements and credibility of potential future witnesses; the Court having heard the testimony and viewed the various exhibits admitted on February 27th and 28th, 1986; the Court having considered the arguments of counsel and being fully advised in the premises;

THE COURT FINDS:

That at all times herein, Supreme Court Rule 7-107 was in full force and effect;

That the People and the Defendant through their respective attorneys, including the Public Defender representing Defendant Buckley, as well as the convicted Defendants Cruz and Hernandez's attorneys, were concerned that third parties were being furnished or "leaked" information and documents relating to the instant case thereby affecting the Defendant's rights as well as the People's rights to a fair and impartial jury trial;

That to stem the leakage of information and documents to third parties, the attorneys of record in the instant cause did orally agree not to disclose information or documents to any such third party; that in spite of the agreement, certain information continued to flow to third parties and subsequently appeared in the media notwithstanding Supreme Court Rule 7-107, and notwithstanding said oral agreement of the attorneys;

That there has been a great deal of media coverage of the instant cause, including but not limited to any alleged statements, identity or credibility of potential future witnesses.

That Defendant Buckley's previous trial resulted in a mistrial;

That the instant case, PEOPLE V. BUCKLEY, is set for trial on April 23, 1986;

That a compelling State interest exists in the right of the State and the Defendant to a fair trial before an impartial jury and this Court's affirmative duty to secure for the parties such rights;

That the Court has considered the oral arguments, evidence and rights advanced by Intervenors, and finds that those rights, although substantial, are outweighted by a need to secure fair trial guarantees to the State and the Defendant;

That there exists a reasonable probability of prejudice to the interests of the State and the Defendant to a fair trial should these proceedings continue without protective orders concerning the unrestrained dissemination of information by

attorneys of record, their agents, Court personnel or law enforcement officials and their agents;

That based upon this Court's review of all the evidence admitted in previous hearings for change of venue and based upon the concern of all parties that documents and information were being "leaked" to third parties, and based upon the evidence presented in this motion and hearing, and based upon this Court having considered other alternatives, including oral agreements of the parties and the existence of Supreme Court Rule 7-107, the Court finds that said alternatives do not and have not provided adequate protection to fair trial guarantees;

That this Court has the inherent authority to enter, vacate and modify protective orders.

IT IS, THEREFORE, ORDERED:

1. That this Court's prior Orders of December 23, 1985, January 6, 1986 and January 10, 1986, are hereby vacated;

2. That certain papers in the instant cause have been withdrawn by the State from the Clerk's file and other papers sealed by this Court, because they consist of materials which bear upon the identity, testimony and credibility of witnesses and are the subject matter and object of ongoing investigations by the Defendant and the People of the State of Illinois and are not to be disclosed;

3. That the transcripts of proceedings in the instant cause from and including December 15, 1985, to and including January 21, 1986, shall not be released or transcribed; except that one copy of all transcripts during said period shall be furnished to this Court for this Court's review so this Court may make a determination as to which parts, if any, of said transcripts shall be released or withheld from release; no file is to be re-constituted;

That transcripts of any and all court proceedings occurring prior to December 15, 1985, are not impounded and are available to the Chicago Lawyer Magazine, to Rob Warden,

or any other member of the press or public by any person, agency or entity in possession of same, subject to the other provisions of this Order. Transcripts of proceedings had from December 15, 1985, to January 21, 1986, which by this Order are being withheld, may bear upon the identity, testimony and credibility of potential witnesses and further are the subject matter and object of ongoing and continuing investigation by the Defendant, the People and by this Court.

4. That except as herein provided, all attorneys of record, past or present, or any of their associates, supervisors or agents, including but not limited to any and all agents, employees and servants of any and all State, County or Municipal Law Enforcement Agencies, shall not make pre-trial extra-judicial public statement or release any documents, photographs or like material or characterize any Court proceeding in this case nor in the case of any co-defendant relating to and concerning:

a) The prior criminal record (including arrests, indictments, or other charges of crime), or the character or reputation of the accused, except that the lawyer or law firm may make a factual statement of the accused's name, age, residence, occupation and family status;

b) The existence or contents of any confession, admission or statement given by the accused or the refusal or failure of the accused to make any statement;

c) The performance of any examinations or tests or the accused's refusal or failure to submit to an examination or test;

d) The identity, testimony or credibility of witnesses, except that the lawyer or law firm may announce the identity of the victim if the announcement is not otherwise prohibited by law;

e) The possibility of a plea of guilty to the offense charged or a lesser offense;

f) Any and all reports, statements, names of witnesses, photographs or any like thing or document arising out of or

concerning any pre-trial investigation which does or may relate to the instant case;

g) Any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case.

The foregoing shall not be construed to preclude said persons during this period, in the proper discharge of his or its official or professional obligations, from disclosing the nature, substance or text of the charge, including a brief description of the offense charged; from quoting or referring without comment to public records of the Court in the case; from announcing the scheduling or result of any stage in the judicial process; from requesting assistance in obtaining evidence; from announcing without further comment that the accused denies the charges made against him.

ENTER: JUDGE ROBERT A. NOLAN
18th Judicial Circuit Court
Wheaton, Illinois 60187

DATED: MAR 3 1986
(5:10 p.m.)

IN THE SUPREME COURT OF
THE STATE OF ILLINOIS

FILED
APR 4 1986
SUPREME COURT CLE

ROB WARDEN, CHICAGO LAWYER, and SANDRA BIETILA,
Plaintiffs,

v.

ROBERT A. NOLAN, Judge, Circuit Court of the Eighteenth Judicial Circuit,
Defendant.

NO. 63318

MOTION FOR LEAVE TO FILE COMPLAINT FOR A WRIT OF MANDAMUS OR SUPERVISORY ORDER

To the Honorable Justices of the Supreme Court of the State of Illinois:

Plaintiffs, Rob Warden, Chicago Lawyer and Sandra Bietila, by their attorneys, respectfully ask leave of this Court to file the accompanying Complaint for A Writ of Mandamus or Supervisory Order.

In support of this motion, plaintiffs state:

1. There is no factual dispute in this case. This case concerns only the legal question of whether the defendant, Judge Nolan, has acted in violation of the United States Constitution and the Constitution of the State of Illinois in issuing an Order prohibiting certain extra-judicial statements by attorneys and sealing certain court files in *People v. Buckley*, 84 CF 362 (Circuit Court of DuPage County), now pending before Judge Nolan. The Order was issued on March 3, 1986 without prior

notice to the public and without adequate consideration of alternatives.

The Order is not supported by either sufficient record evidence or sufficient factual findings, is not narrowly tailored, and does not protect a compelling state interest. In addition, it uses an erroneous legal standard.

2. Defendant's order is a prior restraint against plaintiffs and has resulted in and will continue to cause irreparable harm to their First Amendment rights unless immediate relief is granted by this Court.

3. Defendant's order is not now appealable and therefore plaintiffs lack any alternative vehicle for relief.

4. Plaintiffs submit the accompanying Explanatory Suggestions in support of this motion.

Respectfully submitted,

BY: /s/ JANE M. WHICHER
One of Plaintiff's Attorneys

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No. 63318
IN THE
SUPREME COURT OF ILLINOIS

FILED
MAY 5 1986
SUPREME COURT CLE

ROB WARDEN, CHICAGO LAWYER, and SANDRA BIETILA,
Petitioners,

v.

HON. ROBERT A. NOLAN, Judge of the Circuit Court of DuPage County,
Respondent.

Original mandamus action

ORDER

This cause coming to be heard on the motion of the petitioners, a response and a reply to the response having been filed, and the court being fully advised in the premises;

IT IS ORDERED that the motion for leave to file a petition for a writ of *mandamus* is [*denied*]. Clark, C.J., and Simon, J., dissenting. Dissents attached.

BEST AVAILABLE COPY

Docket No. 63318

ROB WARDEN, CHICAGO LAWYER, and SANDRA BIETILA, Plaintiffs, v. ROBERT A. NOLAN, Judge, Circuit Court of the Eighteenth Judicial Circuit, Defendant.

Chief Justice Clark, dissenting:

I dissent in part from the Court's order denying petitioners' motion, and I would enter a supervisory order directing Judge Nolan to vacate that part of the order entered on March 3, 1986, in the case of *People v. Buckley* (84-CF-362) which sealed certain portions of the record in that case and impounded, pending review by the trial court, the transcript of all proceedings in the case which took place between December 15, 1985, and January 21, 1986.

Docket No. 63318

ROB WARDEN, CHICAGO LAWYER, and SANDRA BIETILA, Plaintiffs, v. ROBERT A. NOLAN, Judge, Circuit Court of the Eighteenth Judicial Circuit, Defendant.

JUSTICE SIMON, also dissenting:

This motion arises from a criminal prosecution for the brutal and tragic murder of a Naperville girl. Two men have already been convicted and sentenced to death in the killing; the first trial of another accused, Stephen Buckley, who is the subject of the current prosecution, ended in a mistrial, and he will be retried shortly. In recent months controversy has surrounded the prosecution amid reports that another convicted murderer, Brian Dugan, may have confessed to the killing.

Plaintiffs, the Chicago Lawyer newspaper, its publisher Rob Warden, and Sandra Bietila, Executive Director of the Illinois Coalition Against the Death Penalty, seek a writ of *mandamus* or a supervisory order vacating gag and impoundment orders entered in the case by the Honorable Robert A. Nolan, a judge of the circuit court of DuPage County. Judge Nolan initially ordered that no attorney ever of record for the three defendants in the case discuss it publicly and ordered the entire court file impounded. On March 3, 1986, on plaintiff Warden's motion to vacate, the initial orders were vacated, but Judge Nolan entered a new order impounding the transcripts of certain proceedings held in December 1985 and January 1986 and sealing certain portions of the record. The order also prohibited all attorneys ever of record and all law enforcement personnel from making extrajudicial statements or releasing documents relating to seven categories of information, including "the identity, testimony, or credibility of witnesses."

Although they do not constitute direct prior restraints on a publisher, plaintiffs allege that the orders entered by Judge Nolan have effectively prevented them from obtaining and publishing information on matters of critical public interest and

thus fall within the ambit of first amendment protections. We have not had the benefit of argument nor have we inspected the impounded documents or the sealed portion of the record; however, it appears to me that Judge Nolan's orders throw an unnecessary cloak of silence over matters of public importance and thereby threaten core first amendment values. "The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions *** are without question of legitimate concern to the public and consequently fall within responsibility of the press to report the operations of government." (*Cox Broadcasting Corp. v. Cohn* (1975), 420 U.S. 469, 492.) The orders here, which impede the press in carrying out this responsibility, seem to be unjustified, and I would set plaintiffs' motion for expedited briefing and argument so that this court may determine whether the orders constitute an abuse of discretion.

The gag and impoundment orders were based on the judge's sparsely elaborated finding that there existed a "reasonable probability of prejudice" to the trial of defendant Buckley absent judicial action. This finding was grounded in the "extensive" media coverage the case had received, which may have included information "leaked" from attorneys or law enforcement officers.

The fact that pretrial publicity has occurred is an inadequate foundation for the restraints employed here. The court did not find that the selection of an impartial jury would be impossible absent the orders or that no alternatives existed, and the defendant himself does not even appear to have taken that position. This court has held that the bare existence of pretrial publicity does not demonstrate that a trial was unfair (see, *e.g.*, *People v. Olinger* (April 18, 1986), No. 58652, slip op. at 10), even where that publicity has been sustained and sensational (*People v. Speck* (1968), 41 Ill. 2d 177). I see no reason to apply a different rule in this situation. Before imposing restraints as severe as he did, the judge should have considered alternative means of securing an impartial trial,

such as searching questioning of prospective jurors or a change of venue (if requested by the defendant).

More significantly, Judge Nolan's use of a "reasonable probability of prejudice" standard was clearly erroneous. This court recently ruled that a trial court may restrain parties and attorneys from commenting on a case "*only* if the record contains sufficient specific findings by the trial court establishing that the parties and their attorneys [*sic*] conduct poses a *clear and present danger or a serious and imminent threat to the fairness and integrity of the trial.*" (*Kemner v. Monsanto Co.* (April 18, 1986), No. 61691, slip op. at 14.) (Emphasis in original.) See 87 Ill. 2d R. 7 – – 107 (attorney can be disciplined for extrajudicial statements only if they pose a "serious or imminent threat" to a fair trial).) There has been no determination on the record in this case that there exists a serious and imminent threat to a fair retrial, and I am surprised by this court's willingness to make such short shrift of an important first amendment standard which we announced only three weeks ago. In any event, our decision in *Kemner* casts considerable doubt on the propriety of Judge Nolan's orders here, and I would recommend to him a careful review of that opinion.

The order impounding transcripts of proceedings held in December 1985 and January 1986 is puzzling. While the briefs do not state what those proceedings were, presumably they occurred in open court. Since such proceedings have already become "public property" (*Craig v. Harney* (1947), 331 U.S. 367, 374), the reason for later impounding them is difficult to understand. See *Cox Broadcasting Corp. v. Cohn* (1975), 420 U.S. 469.

The courts must jealously guard the right to a fair trial. We are also charged, however, with the responsibility of ensuring a free and open debate on issues of public importance. Because these two values appear to have been set on a collision course by Judge Nolan's orders, in my judgment those orders warrant a fuller review by this court. I therefore dissent from the denial of the relief requested by this motion.

ILL.Rev.Stat. ch. 110A, Rule 7-107

Rule 7-107. Extrajudicial Statements by Attorneys

(a) A lawyer shall not release or authorize the release of information or opinion for dissemination by any means of public communication if such dissemination would pose a serious and imminent threat to the fairness of a trial or administrative proceeding.

(b) From the commencement of the investigation of a criminal matter until the completion of trial or disposition without trial, a lawyer associated therewith may be subject to disciplinary action with respect to extrajudicial statements violative of the standard set forth in Rule 7-107(a) which concern the following matters:

(1) the prior criminal record (including arrests, indictments or other charges of crime), or the character or reputation of the accused, or any opinion as to the accused's guilt or innocence, or as to the merits of the case or the evidence in the case;

(2) the existence or contents of a statement given by the accused, or the refusal or failure of the accused to make any statement;

(3) the performance of an examinations or tests or the accused's refusal or failure to submit to any examination or test;

(4) the identity, testimony, or credibility of prospective witnesses;

(5) the possibility of a plea of guilty to or other disposition of the offense charged; or

(6) information which the lawyer knows or has reason to know would be inadmissible as evidence in a trial.

(c) It shall be appropriate for a lawyer in the discharge of official or professional obligations in connection with a criminal matter to announce

(1) the name, age, residence, occupation, and family status of the accused;

(2) if the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers that may exist;

(3) a request for assistance in obtaining evidence;

(4) the identity of the victim of the crime, if release of that information is not otherwise prohibited by law;

(5) the fact, time, and place of arrest, resistance, pursuit, and use of weapons;

(6) the identity of investigating and arresting officers or agencies and the length of the investigation;

(7) at the time of seizure a description of the physical evidence seized, other than a confession, admission, or statement;

(8) the nature, substance, or text of the charge;

(9) quotations from or references to public records of the court in the case;

(10) the scheduling or result of any step in the judicial proceedings; or

(11) that the accused denies the charges made against him.

(d) After the completion of a trial or disposition without trial of a criminal matter and prior to the imposition of sentence, a lawyer associated with the prosecution or defense shall not make or participate in making an extrajudicial statement

that poses a serious and imminent threat to the judicious imposition of sentence.

(e) The foregoing provisions of Rule 7-107 also apply to professional disciplinary proceedings and juvenile disciplinary proceedings when pertinent and consistent with other law applicable to such proceedings.

(f) During the investigation or pendency of a civil action or an administrative proceeding, a lawyer associated therewith may be subject to disciplinary action with respect to extrajudicial statements violative of the standard set forth in Rule 7-107(a) which concern

(1) evidence regarding the occurrence or transaction involved;

(2) the character, credibility, or criminal record of a party, witness, or prospective witness;

(3) physical evidence or the performance or results of any examinations or tests or the refusal or failure of a party to submit to such; or

(4) his opinion as to the merits of the claims, defenses, or positions of an interested person.

(g) The foregoing provisions of Rule 7-107 do not preclude a lawyer from replying to charges of misconduct publicly made against him or from participating in the proceedings of legislative, administrative, or other investigative bodies.

(h) A lawyer shall exercise reasonable diligence to prevent his employees, partners, and associates from making an extrajudicial statement that he would be prohibited from making under Rule 7-107.

(i) A partner or associate of a lawyer is bound by the provisions of Rule 7-107 to the same extent as the lawyer.

Supreme Court, U.S.
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No. 86-310

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ROB WARDEN, CHICAGO LAWYER and SANDRA BIETILA,

Petitioners,

v.

HONORABLE ROBERT A. NOLAN, Judge of the Circuit Court of DuPage County,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

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On Petition For A Writ Of Certiorari
To The Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF CASE

Petitioner, Sandra Bietila, has never appeared in the Circuit Court of DuPage County. The first instance wherein Petitioner Bietila appeared was before the Illinois Supreme Court, and did so without ever having sought leave to intervene in those proceedings and without having sought any relief at the trial court level. Before this Court and before the Illinois Supreme Court, she has sought to have the March 3, 1986 order reviewed as to her asserted con-

stitutional interests, based solely on her own affidavit and without the factual underpinning which ordinarily is appropriate before difficult constitutional questions will be reviewed.

The proceedings which culminated in the March 3 order followed the purported confession of Brian Dugan to the Jeanine Nicarico murder for which Stephen Buckley is awaiting retrial. A massive investigation was undertaken by authorities to ascertain the validity of that confession. The exhibits introduced on February 27 and 28 included video tapes of television newscasts and newspaper articles concerning that investigation. A common sense review of those exhibits indicates that the individuals who were subjected to the March 3 order were providing details of the investigation to members of the press.

Contrary to Petitioner's statement, the Special State's Attorney did not appear "as a proponent of new restraints." (Petition for Writ of Certiorari to the Supreme Court of Illinois, page 5.) The hearing held by Judge Nolan was specifically held as a result of Judge Nolan's decision to allow Petitioners and others to intervene and file motions to vacate certain prior orders.

During the hearing on February 27 and February 28, Judge Nolan reviewed a voluminous court file (four volumes) and removed from the court file, in the presence of Petitioners, Warden and *Chicago Lawyer*, a document or documents which were placed in a small manila envelope. The remainder of the court file was then made available for inspection to Petitioners, Warden and *Chicago Lawyer*, and their counsel.

REASONS FOR DENYING THE WRIT

I.

PETITIONERS DO NOT HAVE A FIRST AMENDMENT RIGHT OF ACCESS EITHER TO STATEMENTS OF INDIVIDUALS SUBJECT TO THE JURISDICTION OF THE COURT OR TO COURT RECORDS.

Fundamental to the arguments of Petitioners is the presumption that all of the matters covered by the March 3 order fall under the umbrella of protections afforded by the First Amendment. It is important to note that the Order of March 3, 1986, does not prohibit the Petitioners or any other member of the public from attending either the trial or any pretrial proceeding; does not prohibit the Petitioners or any other member of the press or public from reporting on the case of *People v. Buckley*, 84 CF 362; allows the press and the public to obtain and examine transcripts of Stephen Buckley's prior trial; allows the inspections of some four volumes of the common law record in *People v. Stephen Buckley*. The only material contained in the court file which is not available to the Petitioners for inspection are certain portions of the transcripts of proceedings from December 15, 1985 to January 21, 1986 and a certain document or documents which were sealed in a small manila envelope in the presence of the Petitioners, Rob Warden and *Chicago Lawyer*.

Furthermore, the Order of March 3, 1986, does not preclude all discussion of the case of *People v. Stephen Buckley*, 84 CF 362, by individuals that are subject to the court's inherent powers. Rather, the order imposes limited restrictions to secure a fair trial for both the State and the defendant. The essence of the right asserted by the Petitioners does not concern their freedom to publish,

but rather the so-called "right of access" which the Petitioners maintain is of constitutional stature. As to either the court record in *People v. Buckley*, 84 CF 362 (Circuit Court of the Eighteenth Judicial Circuit, DuPage County, Illinois), or the communications with attorneys of record and others, this Court has never recognized a First Amendment "right of access".

A. Official Court Records And Documentary And Physical Evidence Do Not Qualify For Constitutional Protection.

It is true that judicial records are ordinarily to be available for public inspection. Contrary to Petitioners' arguments, such a right is rooted in the common-law and not the First Amendment to the United States Constitution. (*United States v. Edwards* (7th Cir. 1982), 672 F.2d 1289.) However, the right to inspect and copy judicial records is not absolute.

> "Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. [Citations omitted.]
>
> * * *
>
> It is difficult to distill from the relatively few judicial decisions a comprehensive definition of what is referred to as the common-law right of access or to identify all the factors to be weighed in determining whether access is appropriate. The few cases that have recognized such a right do agree that the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." (Footnotes omitted.) *Nixon v. Warner Communications, Inc.* (1978), 435 U.S. 589, 598-599, 55 L.Ed.2d 570, 98 S.Ct. 1306, 1312-1313.

In *United States v. Edwards* (7th Cir. 1982), 672 F.2d 1289, the press sought and was denied access to an audio recording admitted into evidence. In deciding that the trial court did not abuse its discretion in denying access to this recording, the court of appeals recognized that the right relied upon by the press was of non-constitutional origin and that in a given case, a number of factors may militate against public access. (See also *Nixon v. Warner Communications, Inc.* (1978), 435 U.S. 589, 55 L.Ed.2d 570, 98 S.Ct. 1306; *Belo Broadcasting Corp. v. Clark* (5th Cir. 1981), 654 F.2d 423; *United States v. Torres* (N.D. Ill. 1985), 602 F.Supp. 1458.)

While a common law right of access may exist as to judicial records, that right is subject to the inherent powers of the court to limit access to those records. Here, upon a careful review of the voluminous record, Judge Nolan restricted access to only a small portion of the record. The publicity which has surrounded the alleged Dugan confession and the intense scrutiny which the *Buckley* case has received, is more than ample justification for the limited restrictions imposed. The responsibility of the trial court to insure the fair administration of justice and to secure for the defendant his constitutional right of a fair trial justifies restricting access to judicial records when publicity threatens the fairness of the proceeding.

This court has consistently recognized the potential dangers which accompany pretrial proceedings.

In *Gannett Co., Inc. v. DePasquale* (1979), 443 U.S. 368, 61 L.Ed.2d 608, 99 S.Ct. 2898, this Court recognized the affirmative constitutional obligation which the trial court has in safeguarding these rights.

> "This Court has long recognized that adverse publicity can endanger the ability of a defendant to receive a fair trial. [Citations omitted.] To safeguard the due

> process rights of the accused, *a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity.* [Citation omitted.] And because of the Constitution's pervasive concern for these due process rights, a trial judge may surely take protective measures *even when they are strictly and inescapably necessary.*" (Emphasis added.) 99 S.Ct. at 2904.

Petitioners cite no authorities which suggest there exists a First Amendment right of access to court records and files and hence, no constitutional issues are raised that would merit review by this Court.

B. No First Amendment Right Of Access Exists As To Attorneys, Court Personnel And Law Enforcement Agencies.

The Petitioners also implicitly argue that they possess a First Amendment right of access to attorneys, court personnel, and law enforcement personnel. Such a right does not exist.

The Petitioners are correct in asserting that lawyers appearing in a case are particularly useful sources of information concerning pending litigation. However, lawyers are also proponents of a particular position in an adversarial system and can be the source of prejudice to the opposing party or to the State's interest in maintaining the fairness of proceedings.

> "Because such a system relies deliberately on highly partisan advocacy by counsel, both in shaping and moving litigation along, it is especially vulnerable to the natural human tendency of counsel to enlist extraneous influences in behalf of their causes and to take the structured battle of the litigation process 'into the streets,' or into the public forum afforded by the free press." *Hirschkop v. Snead* (4th Cir. 1979), 594 F.2d 356, 377 (J. Phillips, concurring).

In *Sheppard v. Maxwell* (1966), 384 U.S. 333, 16 L.Ed.2d 600, 86 S.Ct. 1507, this Court reversed the defendant's conviction because of pretrial publicity. In reaching its decision, the Supreme Court commented upon some of the restrictions the trial court should have imposed.

> "[T]he court should have made some effort to control the release of leads, information and gossip to the press by police officers, witnesses, and counsel for both sides.
>
> * * *
>
> [W]e must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures." 384 U.S. at 359, 363, 16 L.Ed.2d at 618, 620. See *Nebraska Press Ass'n v. Stuart* (1976), 427 U.S. 539, 49 L.Ed.2d 683, 96 S.Ct. 2791, 2800.

To recognize a First Amendment right of access to these individuals and impose the "substantial probability" test recognized in *Press Enterprise Co. v. Superior Court*, ____ U.S. ____, 39 Cr.L. 3253 (No. 84-1560, decided June 30, 1986), would effectively deprive the trial court of perhaps one of the most reasonable means of securing fair trial guarantees for both the State and the defendant.

There is no doubt that the State has a substantial interest in ensuring the fairness of judicial proceedings. (*Sheppard v. Maxwell* (1966), 384 U.S. 333, 16 L.Ed.2d 600, 86

S.Ct. 1507; *Singer v. United States* (1965), 380 U.S. 24, 13 L.Ed. 2d 630, 85 S.Ct. 783; *In re Sawyer* (1959), 360 U.S. 622, 666, 3 L.Ed.2d 1473, 1499, 79 S.Ct. 1376, 1397 (Frankfurter, J., dissenting.) Courts have recognized that restricting extra-judicial statements of criminal defense attorneys relates to the government's substantial interest in preserving the proper administration of justice and the basic integrity of the judicial process. (See *Singer v. United States* (1965), 380 U.S. 24, 13 L.Ed.2d 630, 85 S.Ct. 783.) These rights and interests can be impaired by lawyers' unrestrained, prejudicial comments pending trial. (See *Irwin v. Dowd* (1961), 366 U.S. 717, 6 L.Ed.2d 751, 81 S.Ct. 1639.)

Judge Nolan acted carefully to discharge his affirmative constitutional duty to secure to the State and the defendant a fair proceeding. Since no First Amendment right of access has ever been recognized as to court files or individuals subject to the jurisdiction of the trial court, this case does not merit review by this Court.

C. The Withholding Of Certain Limited Transcripts Does Not Violate Any Rights Of Petitioners.

In his March 3 order, Judge Nolan withheld transcripts of the proceedings which occurred between December 15, 1985 and January 21, 1986. Subsequently, a portion of these transcripts were released. Respondent submits that withholding of these transcripts was not error.

Although in *Press Enterprise Co. v. Superior Court*, ____ U.S. ____, 39 Cr.L. 3253 (No. 84-1560, decided June 30, 1986), this Court recognized that a qualified First Amendment right of access attaches to preliminary hearings, this Court has yet to hold that such a right attaches to other pretrial proceedings. Historically, the public had

no right to attend pretrial proceedings. (See *Gannett v. DePasquale*, 443 U.S. 368, 61 L.Ed.2d 608, 99 S.Ct. 2898 (1979).) The Court in *Gannett* approved of the closure of a pretrial suppression hearing and sealing transcripts of that hearing, based upon a finding that an open proceeding would pose a "reasonable probability of prejudice to these defendants." Here, Judge Nolan specifically found that the transcripts being withheld bore upon the identity, testimony and credibility of potential witnesses and were the subject matter of ongoing investigations. The Court also found that there had been a great deal of media coverage of the instant cause, including but not limited to alleged statements, identity or credibility of potential future witnesses and that Defendant Buckley's previous trial resulted in a mistrial. Judge Nolan found that the rights of the Petitioners were outweighed by a need to secure fair trial guarantees to the State and the Defendant.

Assuming arguendo that a First Amendment right of access existed as to the proceedings which remained sealed, such a right was found to be outweighed by the interests of the State and the defendant. As in *Gannett*, no error was committed by the Respondent on entering the March 3 order and review of that decision is not warranted.

II.

THE CLAIMS OF PET'TIONER, SANDRA BIETILA, SHOULD NOT BE REVIEWED BY THIS COURT.

Petitioner Bietila has never appeared before the Respondent and advanced the claims she now seeks to have reviewed. Rather, Petitioner Bietila appeared for the first time in the second *mandamus* proceeding filed in the

Illinois Supreme Court. (*Warden v. Nolan*, No. 63318.) The only source to identify Ms. Bietila's interest is her own affidavit filed in the Illinois Supreme Court, an affidavit full of conclusions. Although she asserts that certain of her constitutional guarantees have been infringed, the case in its present posture lacks the concrete adverseness which sharpens the issues to illuminate difficult constitutional questions. (See *Flast v. Cohen* (1968), 392 U.S. 83, 20 L.Ed.2d 947, 88 S.Ct. 1942 (1968).) In light of the present record, the claims of Petitioner Bietila should not be reviewed.

III.

AMPLE NOTICE WAS GIVEN OF THE PROCEEDINGS WHEREIN PETITIONERS CHALLENGED THE RESPONDENT'S PROTECTIVE ORDERS.

Although Petitioner Bietila asserts that she did not have notice of the proceedings which culminated in the March 3 order, ample notification was given. On February 4, 1986, an article appeared in the *Chicago Sun-Times*, a newspaper of general circulation in the six-county greater metropolitan Chicago area, headlined "Gag Order Is Challenged in Nicarico Case." This article described the efforts by Petitioners, Warden and *Chicago Lawyer*, to vacate the protective orders entered by Judge Nolan on December 23, 1985, January 6, 1986, and January 10, 1986. (People's Exhibit 10a from February 27-28 hearing.) That article indicated the next hearing date was February 19, 1986 before Judge Nolan. On February 20, 1986, an article appeared in the *Chicago Tribune* headlined "Nicarico gag order open to challenge." (People's Exhibit 11a from hearing of February 27-28, 1986.) The article stated that a hearing on the "ACLU's motion" was set for next Thursday.

In light of the publicity given to the efforts of Petitioners Warden and *Chicago Lawyer*, what more notice could have been given. Whether or not notice is required is not determinative, since notice was in fact given. This Court should not be called upon to decide abstract propositions.

CONCLUSION

The arguments of Petitioners presume that constitutional rights have been infringed. Respondent respectfully submits that as to the court record and communications by attorneys and others, no First Amendment right of access exists. As to the portions of court transcripts that remain sealed, any rights of Petitioners have been adequately protected. As to Petitioner Bietila, her failure to ever appear in the trial court and seek to intervene in these proceedings is fatal to her request that this Court review her claim of error.

WHEREFORE, Respondent prays that this Court deny the Petition for Writ of Certiorari to the Supreme Court of Illinois.

Respectfully submitted,

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

PETITIONERS' REPLY MEMORANDUM

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Judge of the Circuit Court of DuPage County,
Respondent.

On Petition For A Writ of Certiorari
To The Supreme Court of Illinois

PETITIONERS' REPLY MEMORANDUM

The subject of this litigation is an order issued by the Respondent, a Judge of the Circuit Court of DuPage County, Illinois. The order was entered on March 3, 1986 and imposed prior restraints of indefinite duration on attorneys and law enforcement personnel and denied the press and the public access to unknown and uniden-

tified material in the court record and to transcripts of certain pretrial proceedings some of which had been open to the public at the time they were held.

Respondent's position is that his restrictions on access to unidentified court records and prior restraints on communications by attorneys and law enforcement are lawful because the First Amendment does not apply at all to judicial records or "access to" such persons. In the same vein, Respondent asserts there is no constitutional right of public access to transcripts of pretrial court proceedings and in the event there is, his vague and conclusory findings provide a constitutionally adequate predicate. Petitioner Bietila apparently presents "no case or controversy" per the Respondent. Lastly, published newspaper accounts of a scheduled hearing of Warden's

Warden's motion to vacate existing restrictions served to provide constitutionally adequate notice of the Respondent's intention to impose new, prospective restraints later proposed by his own counsel. The decisions of this Court and the evidence of record require the rejection of these erroneous positions and the issuance of a Writ of Certiorari.

I. THE FIRST AMENDMENT PROTECTS ACCESS TO TRANSCRIPTS AND COURT RECORDS

A. Access To Transcripts Of Proceedings

Contrary to Respondent's assertions, the transcripts to which Petitioners have been denied access are of proceedings to which the First Amendment right of public access applies. Press Enterprise Co. v. Superior Court, ___ U.S. ___, (June 30, 1986), ("Press-Enterprise II"). In Press-Enterprise II this Court held unconstitu-

tional the denial of access to the transcripts of a closed preliminary hearing. In so doing, the Court reviewed its chain of decisions insuring a constitutional right of access to a number of different types of pretrial proceedings and defined its "tests of experience and logic." Slip Op. at 6-7.

Respondent, without supporting argument, asserts that this Court's affirmance of a First Amendment right of access to preliminary hearings does not apply to "other pretrial proceedings." (Respondent's Brief at 8-9.) Significantly, he fails to supply the information which only he is able to furnish -- the nature and type of proceedings which are in issue.

Petitioners know that at least some of the proceedings were held in public (and know that at least a portion of the January 15, 1986 proceeding was held in camera) and

that a court reporter was present. Petitioners do not know the nature, objectives, outcomes, effects of, or participants in, the proceedings. This quandry, however, serves only to highlight the lack of sufficient findings by the Respondent in not identifying even the nature of the relevant proceedings. In the absence of sufficient findings, we must presume the proceedings in issue meet the tests defined by this Court as establishing a right of access. Press Enterprises II, Slip Op. at 5-10. To do otherwise would allow the ambiguity created by Respondent's vagueness to result in the de facto approval of a procedure barring access to transcripts of public and unknown in camera proceedings prior to trial.

Moreover, as to the Respondent's argument that there was a sufficient

predicate for his restrictions on the transcripts, his conclusory statement that the transcripts sealed "may bear" upon the "identity, testimony and credibility of potential witnesses" falls far short of the burdens imposed on trial courts by Press-Enterprise II. (Order of March 3, 1986, Par. 2 and Par. 3, Petition for Certiorari, App. 18a-19a.)

Without access to transcripts of court proceedings for the period of December 15, 1985 to January 21, 1986, neither Petitioners nor any other member of the public would be able to ascertain what actually occurred in courtroom proceedings preparatory to the retrial in Buckley.[1] In Press Enterprise II, this Court found that

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[1] The subsequent release of some of these transcripts (on or about May 7, 1986) does not moot the issue of all of the transcripts originally being withheld. Press Enterprise II, Slip Op. at 4.

denying transcripts to the public would frustrate the value of "openness" of criminal proceedings. Slip Op. at 11. In Press Enterprise Co. v. Superior Court, 464 U.S. 501, 508 (1984), ("Press Enterprise I"), this Court explained that "the value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the same knowledge that anyone is free to attend gives assurances that established procedures are being followed and that deviations will become known." (Emphasis in original.) The value of openness is not served by sealing transcripts of proceedings which were open when they occurred. Where the public relies on the openness of the proceeding rather than actual attendance, denial of access to transcripts of official court proceedings is

the equivalent of denial to the proceedings themselves.

B. Access To The Unidentified Court Records

Respondent's March 3 Order sealed unidentified documents in the previously-public court file "because they consist of materials which bear upon the identity, testimony and credibility of witnesses and are the subject matter and object of ongoing investigations." (Petition for Certiorari, App. 18a.) Respondent's Brief (at 4-6) simply denies that a First Amendment right is involved, and asserts that public access to public court files is "subject to the inherent powers of the court."

Respondent's principle authority for his assertion that no First Amendment right is involved is United States v. Edwards, 672 F.2d 1289 (7th Cir. 1982). In that case,

however, no constitutional claim of right to access to the tape recordings in issue was made. 672 F.2d at 1292. Moreover, the Seventh Circuit subsequently has explicitly recognized the First Amendment right of access. In Matter of Continental Illinois Securities Litigation, 732 F.2d 1302, 1308 (7th Cir. 1984), that Court held that a First Amendment right of access applies to exhibits to a motion to terminate claims in a shareholders' derivative suit.

Other Circuit Courts of Appeals have reached the same conclusion. In United States v. Smith, 776 F.2d 1104 (3d Cir. 1985), the Third Circuit found a constitutional right of access to bills of particulars in criminal cases, which could only be restricted if the requirements of Press-Enterprise I are followed. 776 F.2d at 1111-12. Similarly, the Ninth Circuit in

Associated Press v. United States District Court, 705 F.2d 1143, 1145 (9th Cir. 1983) found a First Amendment right of access to "pretrial documents in general," reasoning that they can be important to public understanding of the criminal process.

Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978), also relied upon by Respondent, provides no support for his argument. In that case, this Court considered whether the free press guarantee affords media the right to obtain and copy tape recordings, for rebroadcast, that had been introduced in evidence at trial. The tapes had been played in court, and transcripts of them had been provided. "There simply were no restrictions upon press access to, or publication of any information in the public domain . . . . There is no question of a truncated flow of

information to the public." 435 U.S. at 609.

That is very different from this case, where Respondent removed from public court files, without sufficient findings, previously-public documents. Here, there is an impediment to the flow of information to the public. While in Nixon the press and public were under no restrictions in their access to information, Petitioners have been forclosed from even knowing the nature of the document(s).[2] Unlike Nixon, the "value of openness" of the judicial process is contravened by the sealing of formerly accessible documents.

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[2] Respondent has never identified the sealed documents. At a minimum, constitutionally adequate findings required as much. Indeed, even before this Court, Respondent maintains his posture of secrecy, refusing to disclose even the quantity of sealed materials. E.g., "a certain document or documents." (Respondent's Brief at 3.)

II. COMMUNICATIONS BY ATTORNEYS AND LAW ENFORCEMENT PERSONNAL ARE PROTECTED BY THE FIRST AMENDMENT

In defending Par. 4 of the March 3, 1986 order which forbids communications pertaining to People v. Buckley, Respondent has inaccurately characterized Petitioners as asserting a right of access to attorneys and others. This is not the basis for Petitioners' attack on this portion of the order.

As set forth in Par. 5 of Petitioner Warden's affidavit filed in the Supreme Court of Illinois, it is his position that but for Respondent's order, persons subject to the order would provide him with information and documents concerning the case. (Petition for Certiorari, App. 9a.) Petitioners recognize that any attorney or law enforcement official may decline to speak to them. As to persons willing to

communicate with each other, the order stands as an unconstitutional prior restraint. Such an interference with communication between willing speakers and listeners offends the First Amendment. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756-757 (1976).

In casting his argument against a "right of access" which Petitioners have not claimed, Respondent has ignored the heavy burden of justification for the prior restraints imposed by his order. The order lacks any finding of a substantial probability of prejudice to Buckley's ability to receive a fair trial. Trial participants and law enforcement agents have been forbidden to speak on broad categories of topics with no showing of any serious and imminent threat to a fair trial. Such

restraints on trial participants who may be willing to speak to Petitioners violate the First Amendment rights of the press by withdrawing significant sources of information. CBS, Inc. v. Young, 522 F.2d 234 (6th Cir. 1975). See also, Levine v. U.S. District Court, 764 F.2d 590, 594 (9th Cir. 1985).

Rule 7-107 of the Supreme Court of Illinois, Ill. Rev. Stat. Ch. 110A Rule 7-107 (1985), from which the prohibitions of the gag order are drawn, provides an adequate legal remedy for any statements which present a serious and imminent threat to the fairness of a trial. In the absence of specific findings tied to an identifiable threat to a fair trial, discipline of persons who actually transgress the rule must be chosen in preference to imposition of broad prior restraints. Southeastern

Promotions, Ltd. v. Conrad, 420 U.S. 546, 558-559 (1975).

III. PETITIONER BIETILA HAS STANDING TO SEEK REVIEW IN THIS COURT AND NOTICE WAS CONSTITUTIONALLY INSUFFICIENT

Petitioner Bietila as a member of the public with a specialized interest in proceedings where capital punishment may be imposed has standing to pursue this Petition.

Respondent attacks Bietila's standing to complain of restraints because she did not appear before Judge Nolan, but only before the Illinois Supreme Court in Warden v. Nolan II.[3] Under Illinois law, the Illinois Supreme Court has original jurisdiction in mandamus actions, and in Motions

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[3] Absent a concession that Respondent would vacate his order upon request from Bietila, such a request, on the record of this case, would be futile.

for a Supervisory Order of the Court. Ill. Rev. Stat. Ch. 110A, Sections 381, 383 (1985). Rock v. Thompson, 85 Ill.2d 410 (1981); People v. Kerner, 32 Ill.2d 539 (1965). It is Bietila's appearance before the state supreme court, and the uncontested factual evidence that she provided there (App. 11a-13a) that gives her standing to seek review in this Court. Moreover, while the Illinois Supreme Court gave no reasons to support its denial of relief to Petitioners, it did not distinguish between Petitioners on grounds of standing.

As a member of the public who has need to communicate with persons barred from providing information as a direct result of Respondent's order, Petitioner Bietila has standing to seek review in this Court. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at

756-757.

Instead of meeting his duty to justify why notice of a hearing on prospective restraints is not a constitutional requirement, Respondent argues that because the scheduling of a hearing on the then-existing gag order happened to be reported in the press, sufficient notice was provided. However, Petitioners complain of the failure to give notice that prospective restraints would be considered.

CONCLUSION

The decisions of this Court required the Respondent to accord First Amendment protection to the transcripts, records and communications in issue in this case. The failure of Respondent and the Illinois Supreme Court to identify and properly resolve these important issues necessitates the granting of the Writ of Certiorari by

this Court.

Respectfully submitted,

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